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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 130104011-3011-01]

RIN 0648-BC87

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2013-2014

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to implement limits on fishing effort by U.S. purse seine vessels in the U.S. exclusive economic zone and on the high seas, restrictions on the use of fish aggregating devices (FADs), and requirements for U.S. purse seine vessels to carry observers. This action is necessary for the United States to implement provisions of a conservation and management measure (CMM) adopted by the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) and to satisfy the international obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), to which it is a Contracting Party.

DATES: Comments must be submitted in writing by [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA-NMFS-2013-0043, and the regulatory impact review (RIR) prepared for this proposed rule, by either of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0043, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, might not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name and address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

An initial regulatory flexibility analysis (IRFA) prepared under authority of the Regulatory Flexibility Act is included in the Classification section of the SUPPLEMENTARY INFORMATION section of this proposed rule.

Copies of the EA and RIR prepared for this proposed rule are available from www.regulations.gov or may be obtained from Michael D. Tosatto, NMFS PIRO (see address above).

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS PIRO, 808-944-2219.

SUPPLEMENTARY INFORMATION:

Background on the Convention and the WCPFC

The Convention Area comprises the majority of the western and central Pacific Ocean (WCPO). A map showing the boundaries of the Convention Area can be found on the WCPFC Web site at: www.wcpfc.int/doc/convention-area-map. The Convention focuses on the conservation and management of highly migratory species (HMS) and the management of fisheries for HMS. The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of HMS in the WCPO.

As a Contracting Party to the Convention and a Member of the WCPFC, the United States is obligated to implement the decisions of the WCPFC. The WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The Secretary of Commerce has delegated the authority to promulgate regulations to NMFS.

WCPFC Decisions Regarding Purse Seine Fisheries and Description of the Proposed Action

At its Ninth Regular Session, in December 2012, the WCPFC adopted CMM 2012-01, “Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the

Western and Central Pacific Ocean.” The CMM’s stated general objective is to ensure that the stocks of bigeye tuna (Thunnus obesus), yellowfin tuna (Thunnus albacares), and skipjack tuna (Katsuwonus pelamis) in the WCPO are, at a minimum, maintained at levels capable of producing their maximum sustainable yield as qualified by relevant environmental and economic factors. The CMM includes specific objectives for each of the three stocks: for each, the fishing mortality rate is to be reduced to or maintained at levels no greater than the fishing mortality rate associated with maximum sustainable yield. The requirements of the CMM, identified as “interim” measures, are for calendar year 2013. The CMM also calls for the WCPFC to establish, at its regular annual session in December 2013, a multi-year management program for 2014-2017 for the three stocks.

CMM 2012-01 is the most recent in a series of CMMs for the management of tropical tuna stocks under the purview of the WCPFC. It is a successor to CMM 2011-01, adopted in March 2012 (most provisions of which were applicable in 2012), and before that CMM 2008-01, adopted in December 2008 (most provisions of which were applicable in 2009-2011). These CMMs are available with other decisions of the WCPFC at www.wcpfc.int/decisions.htm.

In 2009 NMFS issued regulations to implement the purse seine-related provisions of CMM 2008-01 (final rule published August 4, 2009; 74 FR 38544; hereafter “2009 rule”). In December 2011, after an intersessional decision by the WCPFC to extend CMM 2008-01, NMFS issued regulations to extend the purse seine-related regulations through December 31, 2012 (interim rule published December 30, 2011; 76 FR 82180; hereafter “2011 rule”). NMFS did not develop regulations to implement the purse seine-related provisions of CMM 2011-01 because the applicable provisions had already been effectively implemented in the 2011 rule.

CMM 2012-01 obligates WCPFC Members, Cooperating Non-members and Participating Territories (collectively, CCMs) to implement, for purse seine vessels, in the Convention Area between the latitudes of 20° North and 20° South: (1) limits on fishing effort on the high seas and in their respective exclusive economic zones (EEZs); (2) restrictions on the use of fish aggregating devices (FADs), including a prohibition on setting on FADs during specified periods; (3) a requirement that observers be on board during all fishing trips, with certain exceptions; and (4) a requirement that all bigeye tuna, yellowfin tuna, and skipjack tuna be retained on board up to the point of first landing or transshipment, with certain exceptions.

Unlike CMMs 2008-01 and 2011-01, the provisions of CMM 2012-01 apply only to areas of high seas and EEZs within the Convention Area; they do not apply to territorial seas or archipelagic waters. Accordingly, the requirements of this proposed rule would apply only in areas of high seas and EEZs, which was not the case with all the requirements established in the 2009 rule and 2011 rule.

The “interim” measures of CMM 2012-01 are applicable for 2013. The CMM also calls for the WCPFC to adopt a new CMM for bigeye, yellowfin, and skipjack tuna during its next regular annual session, in December 2013. The new CMM would be a multi-year management program for 2014-2017 that is designed to achieve the management objectives for the three stocks that are set out in CMM 2012-01. Under section 505(a) of the WCPFC Implementation Act, NMFS is authorized to promulgate such regulations as may be necessary to carry out the United States’ international obligations under the Convention. It is foreseeable that the new CMM would include some of the same provisions for purse seine vessels as those included in CMM 2012-01. NMFS proposes to implement this proposed rule for 2014 as well as 2013, as it believes this is the most effective way to ensure that the United States satisfies its international

obligations under the Convention for 2014. Implementing this proposed rule for both 2013 and 2014 would also serve to provide early public notice that the regulations would remain the same in 2014 unless the purse seine provisions of the new CMM differ from those in CMM 2012-01. Once the WCPFC adopts a new CMM, NMFS would take any steps necessary to implement the WCPFC's decision(s).

This proposed rule would satisfy the obligations of the United States under CMM 2012-01 with respect to U.S. purse seine vessels. CMM 2012-01 also includes requirements for longline vessels, which would be implemented for U.S. longline vessels in a separate rulemaking. This proposed rule includes three elements, corresponding to the first three of the four purse seine-related provisions of CMM 2012-01 identified above (i.e., fishing effort limits, FAD restrictions, and observer requirements). The fourth purse seine-related provision of CMM 2012-01 – the catch retention requirement for bigeye tuna, yellowfin tuna and skipjack tuna – would not be implemented in this proposed rule because that requirement is already in effect for 2013 and 2014 (see final rule issued December 3, 2012, removing the December 31, 2012, termination date of the catch retention provisions; 77 FR 71501). Further information on the three elements of this proposed rule follows:

(1) Fishing Effort Limits

The proposed rule would establish limits for each of calendar years 2013 and 2014 on the number of fishing days that may be used by the U.S. purse seine fleet in the U.S. EEZ and on the high seas within the Convention Area between the latitudes of 20° North and 20° South.

With respect to the U.S. EEZ, CMM 2012-01 requires coastal CCMs to “establish effort limits or equivalent catch limits for purse seine fisheries within their EEZs that reflect the geographical distributions of skipjack, yellowfin, and bigeye tunas, and are consistent with the

objectives for those species.” With respect to the high seas, CMM 2012-01 requires CCMs to “take measures not to increase fishing days on high seas.” For the purpose of these limits, and in order to provide continued operational flexibility for affected purse seine vessels, the high seas and U.S. EEZ within the Convention Area would be combined into a single area – called the Effort Limit Area for Purse Seine, or ELAPS, as similarly done in the 2009 rule and 2011 rule.

The limit in the ELAPS would apply on a calendar-year basis, in each of 2013 and 2014. The limit for each year would be 2,588 fishing days. This is the same rate at which fishing effort was limited in the 2009 rule for the years 2009-2011, and extended by interim final rule for the year 2012. The limiting fishing rate of 2,588 fishing days per year was based on fishing effort by the U.S. purse seine fleet in the reference year of 2004, as specified in CMM 2008-01, and the size of the fleet at that time as compared to the number of U.S. vessels allowed to be licensed under the Treaty on Fisheries between the Governments of Certain Pacific Islands States and the Government of the United States of America (aka South Pacific Tuna Treaty, or SPTT). The limits in 2009-2012 were implemented as overlapping multi-year limits, with a limit of 3,882 fishing days in each year, a limit of 6,470 fishing days in each two-year period, and a limit of 7,764 fishing days (i.e., three times the base rate of 2,588 fishing days per year) for each three-year period. The three-year limits were for the purpose of constraining fishing effort within the WCPFC-mandated limits, while the one- and two-year limits were aimed at avoiding unduly long closed periods. Further details on the basis for the limits established in the 2009 rule are available in that final rule and the proposed rule that led to it (published June 1, 2009; 74 FR 26160). Because the provisions of CMM 2012-01 are for a one-year period and because modifications to the effort limits established in this proposed rule might be needed if the WCPFC

adopts a new CMM at the end of 2013, the fishing effort limits in this proposed rule are annual limits.

(2) FAD Restrictions

CMM 2012-01 requires CCMs to prohibit their purse seine vessels from setting on FADs in EEZs and on the high seas in the Convention Area between the latitudes of 20° North and 20° South from July 1 through September 30. The CMM further requires CCMs to either prohibit setting on FADs in October or limit the total number of FAD sets in the calendar year by the CCM's purse seine fleet to two-thirds of the fleet's average annual number in the 2001-2011 period, as specified in Attachment A of CMM 2012-01 (for a CCM that is a Small Island Developing State, the total annual limit on FAD sets would be eight-ninths of its fleet's 2009-2012 annual average). For the U.S. purse seine fleet, the calendar-year limit would be 1,464 FAD sets. Assuming that fishing patterns in 2013 would be similar to those in recent years, and because the limit-year would start January 1, the 2013 limit of 1,464 FAD sets would be expected to be reached as early as April 2013. It is infeasible for NMFS to complete the rulemaking process that would be necessary to establish the limit and the legal mechanism to prohibit further FAD sets once the limit is reached before April, the date the fleet would likely reach the FAD set limit. Furthermore, NMFS finds that it would not be feasible to establish by that time the mechanism needed to monitor FAD sets with respect to the limit and to reliably project when the limit is likely to be reached so that further FAD sets can be prohibited in a timely manner. For example, a system would have to be established for rapidly processing data collected from vessel observers and/or masters and for using those data to project future levels of FAD sets in advance of actually reaching the limit. Thus, the option of limiting the annual number of FAD sets would likely result in the mandated limit for 2013 being exceeded, and the

United States would have failed to satisfy its international obligations with respect to the purse seine provisions of CMM 2012-01. Because the option of limiting the number of annual FAD sets would be infeasible to implement, and the United States would consequently fail to satisfy its international obligations under the Convention, this option is not considered in detail. Thus, this proposed rule would implement the first of the two options: an additional month, in October, of the FAD closure period. Again, this would be in addition to the three-month FAD prohibition period of July-September.

This proposed rule would maintain many of the same specific FAD-related restrictions during the FAD prohibition periods as those established in the 2009 rule, but to ensure the full effect to the prohibition on FAD setting during the FAD prohibition periods, the definition of FAD would be modified, a new prohibition would be added, and another prohibition would be modified to clarify already prohibited activities.

The 2009 rule defined a FAD to mean any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any objects used for that purpose that are situated on board a vessel or otherwise out of the water (see 74 FR 38544). The definition of FAD also specified that it did not include a fishing vessel, provided that the fishing vessel was not used for the purpose of aggregating fish. The 2009 rule included the following prohibitions during the FAD prohibition periods: (1) setting a purse seine around a FAD or within one nautical mile of a FAD; (2) setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were

drawn by a vessel from the vicinity of a FAD; (3) deploying a FAD into the water; and (4) repairing, cleaning, maintaining, or otherwise servicing a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea. The fourth prohibition, regarding the servicing of FADs, had the following exceptions: (a) a FAD could be inspected and handled as needed to identify the owner of the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and (b) a FAD could be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

This proposed rule would change the definition of a FAD and the specific prohibitions established in the 2009 rule in two main respects. First, the regulatory text would emphasize that setting on fish that have aggregated in association with a vessel when a vessel has used lights to aggregate, move or hold fish is prohibited during the FAD prohibition period. Setting in such a manner was already prohibited under the 2009 rule, as it was prohibited to set on fish aggregated in association with a vessel if the vessel was used to aggregate fish. This proposed rule would amplify that prohibition by explicitly prohibiting the use of lights in specific manners that are known to be used to aggregate fish. These prohibitions would include submerging lights under water from, or suspending or hanging lights over the side of, a purse seine vessel or associated skiffs, other watercraft or equipment; and directing lights into the water or using lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, other watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew. These light-related prohibitions would not apply in specific emergency situations. Second, the prohibitions would be expanded to address the fish aggregating properties of fishing vessels. Like other floating objects, fishing vessels tend to

aggregate fish. In order to give better effect to CMM 2012-01's aim of eliminating fishing on schools associated with floating objects during specified months of the year, during the FAD prohibition period this proposed rule would prohibit setting a purse seine in a manner intended to capture fish that have aggregated in association with a vessel. For example, it would be prohibited to set a purse seine in an area from which a vessel has been moved or removed within the previous eight hours, or to set a purse seine in an area into which fish were drawn by a vessel from the vicinity of a vessel. Thus, vessels would be treated like FADs with respect to some of the prohibited activities. But since vessels would not be treated like FADs with respect to the prohibitions on deploying and servicing FADs, the definition of FAD would not include vessels. A FAD would be defined to mean any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water, but not including a vessel.

(3) Observer Requirements

CMM 2012-01 includes two observer provisions applicable to purse seine vessels. The first calls for each flag CCM to require that its purse seine vessels fishing in the Convention Area between the latitudes of 20° North and 20° South carry observers authorized under the WCPFC Regional Observer Programme (hereafter "WCPFC observers"). This applies to vessels fishing on the high seas, on the high seas and in waters under the jurisdiction of at least one coastal State, or in waters under the jurisdiction of at least two coastal States. In other words, it does not apply to vessels fishing exclusively within the jurisdiction of a single coastal State. The CMM's second observer provision calls for each coastal CCM to require that all purse seine vessels – that is, purse seine vessels of any flag – fishing in the Convention Area between the latitudes of 20°

North and 20° South solely within the jurisdiction of the coastal CCM carry an observer (not necessarily a WCPFC observer).

The first of these two observer provisions was included in similar form in CMM 2008-01 and implemented in the 2009 rule. It would be implemented in a similar fashion in this proposed rule, with one notable difference. The 2009 rule included an exception for fishing trips for which the NMFS Pacific Islands Regional Administrator has determined that a WCPFC observer is not available, provided that written documentation of such determination is carried on board the vessel during the entirety of the fishing trip. This exception was included in that rule because at that time it was not clear whether the observer programs in the region would be able to provide observers on all the required fishing trips made by U.S. purse seine vessels. Given that the Pacific Islands Forum Fisheries Agency observer program has deployed observers on all fishing trips by the U.S. WCPO purse seine fleet for more than three years, NMFS no longer believes that this exception is needed, and it is not included in this proposed rule.

CMM 2012-01's second provision, which is an obligation of coastal States with respect to waters under their jurisdiction, was not included in CMM 2008-01 and thus not included in the 2009 rule. Currently, no foreign purse seine fishing vessels are authorized to fish in the U.S. EEZ in the Convention Area, and no such authorizations are foreseeable during the duration of this proposed rule. Should a foreign vessel be authorized to fish in the U.S. EEZ, a requirement that the vessel carry an observer could be included as one of the terms of that authorization. Therefore, NMFS does not see any need to include a requirement in this proposed rule that foreign purse seine vessels that fish in the U.S. EEZ must carry observers, and this proposed rule does not include such a requirement. Thus, the CMM's second observer provision would be implemented only for U.S. purse seine vessels. Unlike the CMM's first observer provision, the

second provision does not specify that the required observers must be WCPFC observers. However, NMFS has identified only two observer programs that would be used as sources of observers to satisfy this requirement – the Pacific Islands Forum Fisheries Agency observer program and the NMFS observer program. Currently, both these programs are authorized by the WCPFC as part of its Regional Observer Programme, so observers deployed by these two programs are WCPFC observers. Thus, this proposed rule would require that WCPFC observers be carried by U.S. purse seine vessels when fishing solely within the U.S. EEZ.

As described above, this proposed rule would not require U.S. purse seine vessels to carry observers when fishing exclusively in water under the jurisdiction of a single foreign nation. However, in that situation, the foreign nation might have its own observer requirements that apply to the U.S. vessel. Furthermore, U.S. regulations at 50 CFR 300.214 require that if a U.S. fishing vessel with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required is used for fishing for HMS in the Convention Area in areas under the jurisdiction of a CCM other than the United States, the owner and operator of the vessel must ensure that the vessel is operated in compliance with the applicable laws of such CCM, including any laws related to carrying observers.

Summary of Proposed Action

(1) Fishing Effort Limits

This proposed rule would establish for U.S. purse seine vessels a limit of 2,588 fishing days for each of 2013 and 2014, applicable in the ELAPS, which would be defined to include all areas of high seas and the U.S. EEZ within the Convention Area between the latitudes of 20° North and 20° South, and would not include the territorial sea as in the 2009 rule and 2011 rule. Once NMFS determines during either of those years that, based on available information, the

applicable limit is expected to be reached by a specific future date, NMFS would issue a notice announcing the closure of the U.S. purse seine fishery in the ELAPS starting on that specific future date. Upon such closure, it would be prohibited to use a U.S. purse seine vessel to fish in the ELAPS through the end of the calendar year. NMFS would publish the notice at least seven calendar days before the effective date of the closure to provide fishermen advance notice of the closure.

(2) FAD Restrictions

This proposed rule would establish FAD prohibition periods from July 1 through October 31 in 2013 and in 2014, during which it would be prohibited for U.S. fishing vessels to set purse seines on FADs or to engage in specific other FAD-related activities in the Convention Area between the latitudes of 20° North and 20° South.

(3) Observer Requirements

This proposed rule would require that U.S. purse seine vessels carry WCPFC observers on all fishing trips in the Convention Area, except fishing trips that occur entirely outside the area bounded by 20° North and 20° South latitude or entirely within waters of single foreign nation.

In addition to establishing the three sets of requirements described above, this proposed rule would revise paragraph (c) of 50 CFR 300.223, which relates to areas closed to purse seine fishing. The requirements in that paragraph, which implemented the purse seine closed area provisions of CMM 2008-01, expired December 31, 2012. Under this proposed rule the contents of that paragraph would be removed and the paragraph would be reserved. Because the requirements in that paragraph have expired, this revision is merely of a housekeeping nature.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this proposed rule is consistent with the WCPFC Implementation Act and other applicable laws, subject to further consideration after public comment.

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act (RFA)

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the SUMMARY section of the preamble and in other sections of this SUPPLEMENTARY INFORMATION section of the preamble. The analysis follows:

There would be no disproportionate economic impacts between small and large entities operating vessels as a result of this proposed rule. Furthermore, there would be no disproportionate economic impacts based on vessel size, gear, or homeport.

Estimated Number of Small Entities Affected

The proposed rule would apply to owners and operators of U.S. purse seine vessels used for fishing in the Convention Area. The number of affected vessels is the number licensed under the SPTT. The current number of licensed vessels is 40, which is the maximum number of licenses available under the SPTT (excluding joint-venture licenses, of which there are five available under the SPTT, none of which have ever been applied for or issued). Based on limited financial information available on the purse seine fleet, including the fleet's total landings in 2010 and average cannery prices for tuna species in that year, most or all of the businesses that

operate vessels in the fleet are large entities as defined by the RFA. However, it is possible that one or a few of these fish harvesting businesses meet the criteria for small entities (i.e., they are independently owned and operated and not dominant in their fields of operation, and have annual receipts of no more than \$4.0 million), so the purse seine fleet is included in this analysis.

Recordkeeping, Reporting, and Other Compliance Requirements

The proposed rule would not establish any new reporting or recordkeeping requirements (within the meaning of the Paperwork Reduction Act). Affected vessel owners and operators would have to comply with all the proposed requirements, as described earlier in the SUPPLEMENTARY INFORMATION section of the preamble. Fulfillment of these requirements is not expected to require any professional skills that the affected vessel owners and operators do not already possess. The costs of complying with the proposed requirements are described below to the extent possible for each of the three elements of the proposed rule:

(1) Fishing Effort Limits: If and when the fishery in the U.S. EEZ and on the high seas (i.e., in the ELAPS) is closed as a result of the established annual effort limit being reached in either of 2013 or 2014, owners and operators of purse seine vessels would have to cease fishing in that area for the remainder of the calendar year. Closure of the fishery in the ELAPS could cause foregone fishing opportunities and associated economic losses if the ELAPS contains preferred fishing grounds during such a closure. The likelihood of the fishery being closed in the ELAPS in either of the two years and the economic losses a closure would bring cannot be estimated with certainty. Recent fishing patterns (2005 through 2010) suggest a fairly low likelihood of the fishery being closed in the ELAPS. Among the six years in that period, there was only one year, 2005, in which the fleet (extrapolated to a hypothetical 40-vessel fleet, the expected fleet size for the foreseeable future) spent 2,588 fishing days in the ELAPS (in 2005,

the 15-vessel fleet spent 985 fishing days in the ELAPS, equivalent to 40 vessels spending 2,628 fishing days). Thus, the likelihood of the limit being reached appears to be fairly low, and the duration of any closure would likely be relatively brief. However, there is considerable inter-annual variation in the fleet's spatial distribution of fishing effort, influenced to some extent by oceanic conditions associated with El Niño-Southern Oscillation (ENSO) patterns. The eastern areas of the WCPO have tended to be comparatively more attractive to the fleet during El Niño events, when warm water spreads from the western Pacific to the eastern Pacific and large, valuable yellowfin tuna become more vulnerable to purse seine fishing. Consequently, the U.S. EEZ and portions of the high seas within the Convention Area are likely to be more important fishing grounds to the fleet during El Niño events (as compared to neutral or La Niña events).

The ELAPS constitutes a relatively small portion of the WCPO fishing grounds available to, and typically used by, the U.S. purse seine fleet. Unpublished NMFS data indicate that, on average, during 1997 through 2010, annual fishing effort in the ELAPS, in terms of vessel-days fished, made up about 27 percent of the fleet's annual total. The percentages among those years ranged from 6 to 40. In the event of a closure, affected vessels could continue to fish in the Convention Area in foreign EEZs, to the extent authorized. Given that foreign EEZs in the Convention Area have collectively received the majority of the U.S. purse seine fleet's fishing effort (60 to 94 percent in the years 1997-2010), the costs associated with being limited to such areas for what would likely be a relatively small portion of the year would likely not be substantial. Nonetheless, the closure of any fishing grounds for any amount of time would be expected to bring costs to affected entities (e.g., because revenues per unit of fishing effort in the open area might, during the closed period, be lower than in the closed area, and vessels might use more fuel and spend more time having to travel to open areas). As indicated in the preceding

paragraph, the magnitude of the losses would depend on where the best fishing grounds are during the closed period, which would likely be dependent in part on ENSO-related conditions. If the ELAPS is a preferred fishing ground during the closure, then the losses would be accordingly greater than if the ELAPS is not preferred relative to other fishing grounds.

The effort limit could also affect the temporal distribution of fishing effort in the U.S. purse seine fishery. Given that the limit would be competitive – that is, not allocated among individual vessels – vessel operators might have an incentive to fish harder in the affected area earlier in a given year than they otherwise would. A race-to-fish effect might also be expected in the time period between when a closure of the fishery is announced and when it is actually closed, which would be at least seven calendar days. To the extent such shifts occur, they could affect the seasonal timing of fish catches and deliveries to canneries. If deliveries from the fleet were substantially concentrated early in the year, it could adversely affect prices during that period. However, as discussed in the preceding paragraphs, the majority of fishing effort is expected to occur outside the area subject to the proposed limit, so the intensity of any race-to-fish is likely to be low if it occurs at all, and the timing of catches and deliveries would likely not be appreciably impacted. Furthermore, the timing of cannery deliveries by the U.S. fleet alone is unlikely to have an appreciable impact on prices, since many canneries buy from the fleets of multiple nations. A race to fish could bring costs to affected entities if it causes vessel operators to forego vessel maintenance or to fish in weather or ocean conditions that it otherwise would not. This could bring costs in terms of the health and safety of the crew, as well as the economic performance of the vessel. For the reasons stated above, any such costs are expected to be minor. In addition, there is no evidence that economies of scale would favor larger vessels or businesses over smaller ones, or vice versa, if the fleet's fishing effort is constrained by these limits.

(2) FAD Restrictions: The prohibitions on setting on FADs and on fish aggregating in association with fishing vessels (collectively called “FAD restrictions”) in July through October in each of 2013 and 2014 would substantially constrain the manner in which purse seine fishing could be conducted during those periods. The costs associated with these constraints cannot be quantitatively estimated, but the fleet’s historical use of FADs can help give a qualitative indication of the costs. The data on FAD sets presented below do not include sets made on fish aggregating in association with fishing vessels, but the number of the latter type of sets is small. According to logbooks maintained by vessel operators, sets on fish aggregating in association with vessels averaged about four per year for the entire fleet from 1997 through 2010 (examination by NMFS of observer data from selected years indicates a somewhat higher number than the number reported by vessel operators, so vessel logbook data might underestimate the actual number, but the number is still small in comparison to FAD sets). Thus, the data on FAD sets provide useful indicators of the fleet’s historical fishing patterns with respect to the broader types of sets that would be prohibited under the proposed rule. In the years 1997-2010, the proportion of sets made on FADs in the U.S. purse seine fishery ranged from less than 30 percent in some years to more than 90 percent in others. The importance of FAD sets in terms of vessel revenues, and in turn profits, appears to be quite variable over time, and is probably a function of many factors, including fuel prices (e.g., unassociated sets involve more searching time and thus tend to bring higher fuel costs than FAD sets) and market conditions (e.g., FAD fishing, which tends to result in greater catches of lower-value skipjack tuna and smaller yellowfin tuna and bigeye tuna than unassociated sets, might be more attractive and profitable when canneries are not rejecting small fish). Thus, the costs of complying with the FAD restrictions would depend on a variety of factors. The fleet’s experience during 2009-2012,

when two- and three-month FAD prohibition periods were in place, should give an indication of what would be expected to occur under the proposed four-month FAD prohibition periods. The numbers of FAD sets during the prohibition periods were close to zero, but the number of FAD sets across each of the four entire years appears not to have been strongly impacted. That impact is difficult to evaluate in part because there is so much inter-annual variability in the use of FADs. The proportions of all sets that were made on FADs in 2009 and 2010 were lower than the average over the previous 12 years (2010 is the last year for which complete data on set types are available). The proportion in 2009 was within the historical range, while that in 2010 was the lowest during the entire period.

Although it is not possible to quantitatively estimate the costs that affected entities would bear as a result of the FAD prohibition periods, the fact that the fleet has made a relatively large portion of its sets on FADs suggests that prohibiting the use of FADs for four months each year may bring substantial costs and/or revenue losses. To help mitigate those costs, vessel operators might choose to schedule their routine vessel maintenance during the FAD prohibition periods. It also is conceivable that some might choose not to fish at all during the prohibition periods rather than fish without the use of FADs. Observations of the fleet's behavior in 2009-2012 do not suggest that either of these responses occurred to an appreciable degree. The proportion of the fleet that fished during the two- and three-month FAD prohibition periods of 2009-2012 did not appreciably differ from the proportion that fished during the same months in the years 1997-2008, when no FAD prohibition periods were in place.

(3) Observer Requirements: The requirement to carry a WCPFC observer on all fishing trips in the Convention Area between the latitudes of 20° North and 20° South would not bring any compliance costs to affected entities that are not already being borne under existing

requirements. Under regulations at 50 CFR 300.215, U.S. fishing vessels with WCPFC Area Endorsements (which all vessels in the WCPO U.S. purse seine fleet currently have and are expected to continue to have) must carry a WCPFC observer whenever directed to do so by NMFS. Under that authority, NMFS has directed all U.S. purse seine fishing vessels to carry WCPFC observers on all fishing trips in the Convention Area; this directive is in effect from January 1 through December 31, 2013. The proposed observer requirements differ from those already in effect under 50 CFR 300.215 in that the latter apply to all fishing trips in the Convention Area while this proposed rule exempts fishing trips that take place exclusively within areas under the jurisdiction of a single foreign nation or exclusively outside the area bounded by 20° North and 20° South latitude. The proposed requirements are therefore slightly less constraining than the existing requirements (but in practice few trips in either of the two exemption categories are expected to be taken). Thus, the observer requirements in this proposed rule would not bring any costs over and above those already incurred under existing requirements. A similar requirement to carry WCPFC observers on all fishing trips in the Convention Area, with specific exceptions, was also established in the 2009 rule. That requirement expired December 31, 2012. In the IRFA and final regulatory flexibility analysis (FRFA) prepared for the 2009 rule, the cost to purse seine vessels of having to carry a WCPFC observer on every fishing trip in the Convention Area (i.e., to carry a WCPFC observer on the 80 percent of trips that would be required over the 20-percent coverage already required under the SPTT, as discussed below) was estimated to be up to about \$31,300 to \$39,100 per vessel per year (in 2009 dollars).

Duplicating, Overlapping, and Conflicting Federal Regulations

NMFS has not identified any Federal regulations that duplicate, overlap with, or conflict with the proposed regulations, with the exception of the proposed observer requirements. As noted above, under regulations at 50 CFR 300.215, issued under authority of the WCPFC Implementation Act, U.S. fishing vessels with WCPFC Area Endorsements are required to carry WCPFC observers when directed to do so by NMFS. Additionally, U.S. purse seine vessels are subject to observer requirements under authority of the South Pacific Tuna Act of 1988 (SPTA; 16 U.S.C. 973-973r), at 50 CFR 300.43. These regulations require that operators and crew members of vessels operating pursuant to the SPTT allow and assist any person identified as an observer by the Pacific Island Parties to the SPTT to board the vessel and conduct and perform specified observer functions. Under the terms of the SPTT, U.S. purse seine vessels carry such observers on approximately 20 percent of their trips. The proposed observer requirement would overlap with the existing regulations at 50 CFR 300.215 in that carrying an observer during a given fishing trip under either requirement would satisfy the other requirement if it applies to that fishing trip. Similarly, the proposed requirement would overlap with the existing regulations at 50 CFR 300.43 in that carrying an observer under the latter regulation would satisfy the proposed requirement. The proposed requirement would not duplicate (e.g., the overlapping observer requirements would not result in a vessel having to carry two observers on a fishing trip) or conflict with existing regulations.

Alternatives to the Proposed Rule

NMFS has identified and considered several alternatives to the proposed rule, in addition to the no-action alternative. The action alternatives are limited to the ways in which the fishing effort limits and the FAD restrictions would be implemented; no alternatives other than the no-action alternative were identified for the observer requirements in the proposed rule.

(1) Fishing Effort Limits: NMFS has considered in depth two alternatives to the proposed fleet-wide limit of 2,588 fishing days per year in the ELAPS. One alternative would be more restrictive, with separate fleet-wide annual limits in the U.S. EEZ and the high seas in the Convention Area. The limits would be based on the respective levels of the fleet's fishing effort in those two areas in 2010, which were the lowest levels of fishing effort on a per-vessel basis from 1997 through 2010 (this time period was used to maintain consistency with the approach used to calculate the similar limits for the 2009 rule). The limits would be 27 fishing days per year in the U.S. EEZ and 433 fishing days per year on the high seas. These limits would be much more constraining than the proposed limits, and their separation into two areas would provide less operational flexibility for affected purse seine vessels. Thus, these alternative limits would be substantially more constraining and thus more costly than the proposed limits, and this alternative is not preferred for that reason. The second alternative would be less restrictive than the limits proposed in the rule. The high seas and the U.S. EEZ would be combined for the purpose of the limit, and the limit would be the sum of the fleet's respective greatest annual levels of fishing effort in each of the two areas (on an average per-vessel basis, then expanded to a 40-vessel-equivalent) during the 1997-2010 time period. The limit would be 3,943 fishing days per year in the ELAPS. Because this alternative limit is greater and thus less constraining than the proposed limit, the costs of complying with this alternative would be less than or equal to those of the proposed limits. This alternative is not preferred because it would depart from the effort limits established for the period 2009-2012. The limits proposed in this rule are consistent with the precedent set by the 2009 rule, and affected entities have already been exposed to the impacts of these limits for the past four years. In the RFA analysis for the 2009 rule, NMFS considered an alternative that would allocate the fishing effort limits among individual purse

seine vessels in some manner. Given the complexity of setting up such an allocation scheme, which would require consideration of such things as which entities are to receive allocations, the criteria for making allocations, and whether and how the allocations would be transferable, as well as a mechanism to reliably monitor the fishing effort of the individual entities, NMFS does not believe it feasible to develop such an allocation scheme for this proposed rule, and thus has not considered it in depth. NMFS notes, however, that as found in the RFA analysis for the 2009 rule, such an alternative would likely alleviate any adverse impacts of the race-to-fish that might occur as a result of establishing the competitive fishing effort limits as in the proposed rule. Those impacts, however, are expected to be minor. The alternative of taking no action at all is not preferred because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

(2) FAD Restrictions: NMFS has considered one alternative to the proposed FAD restrictions. This alternative would be the same as the proposed restrictions except that it would not be prohibited to set on fish that have aggregated in association with a vessel (provided that the vessel is not used in a manner to aggregate fish). This would be less restrictive and thus presumably less costly to affected purse seine fishing businesses than the proposed requirements. The number of such sets made historically has been relatively small, averaging about four per year for the entire fleet from 1997 through 2010, according to data recorded by vessel operators in logbooks (examination by NMFS of observer data from selected years indicates a somewhat higher number than the number reported by vessel operators, so vessel logbook data might underestimate the actual number, but the number is still small in comparison to FAD sets). Therefore, the degree of relief in compliance costs of allowing such sets for four months each

year would be expected to be relatively small. NMFS believes that this alternative would not serve CMM 2012-01's objective of reducing the fishing mortality rates of bigeye tuna and young tunas through seasonal prohibitions on the use of FADs as well as would the proposed rule. For that reason, this alternative is not preferred. The alternative of taking no action at all is not preferred because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: March 4, 2013.

Alan D. Risenhoover, Director, Office of Sustainable Fisheries,
performing the functions and duties of the Deputy Assistant Administrator for
Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 et seq.

2. In § 300.211, the definitions of “Effort Limit Area for Purse Seine or ELAPS”, and “Fish aggregating device”, or “FAD”, are revised to read as follows:

§ 300.211 Definitions.

* * * * *

Effort Limit Area for Purse Seine, or ELAPS, means, within the area between 20° N. latitude and 20° S. latitude, areas within the Convention Area that either are high seas or within the EEZ.

Fish aggregating device, or FAD, means any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water. The definition of FAD does not include a vessel.

* * * * *

3. In § 300.223, introductory text to the section, paragraph (a) introductory text and paragraph (a)(1), paragraphs (b) and (c), and paragraph (e) introductory text and paragraphs (e)(1) and (e)(2) are revised to read as follows:

§ 300.223 Purse seine fishing restrictions.

None of the requirements of this section apply in the territorial seas or archipelagic waters of the United States or any other nation, as defined by the domestic laws and regulations of that nation and recognized by the United States. All dates used in this section are in Universal Coordinated Time, also known as UTC; for example: the year 2013 starts at 00:00 on January 1,

2013 UTC and ends at 24:00 on December 31, 2013 UTC; and July 1, 2013, begins at 00:00 UTC and ends at 24:00 UTC.

(a) Fishing effort limits. This paragraph establishes limits on the number of fishing days that fishing vessels of the United States equipped with purse seine gear may collectively spend in the ELAPS.

(1) For each of the calendar years 2013 and 2014 there is a limit of 2,588 fishing days.

* * * * *

(b) Use of fish aggregating devices. From July 1 through October 31, 2013, and from July 1 through October 31, 2014, owners, operators, and crew of fishing vessels of the United States shall not do any of the activities described below in the Convention Area in the area between 20° N. latitude and 20° S. latitude:

(1) Set a purse seine around a FAD or within one nautical mile of a FAD.

(2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel.

(3) Deploy a FAD into the water.

(4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that:

(i) A FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and

(ii) A FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

(5) From a purse seine vessel or any associated skiffs, other watercraft or equipment, do any of the following, except in emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage:

(i) Submerge lights under water;

(ii) Suspend or hang lights over the side of the purse seine vessel, skiff, watercraft or equipment, or;

(iii) Direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew.

(c) Closed areas. [Reserved]

* * * * *

(e) Observer coverage. Until 24:00 UTC on December 31, 2014, a fishing vessel of the United States may not be used to fish with purse seine gear in the Convention Area without a WCPFC observer on board. This requirement does not apply to fishing trips that meet either of the following conditions:

(1) The portion of the fishing trip within the Convention Area takes place entirely within areas under jurisdiction of a single nation other than the United States.

(2) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

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